

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant

La Vern Dale Dixon

92-01974

Names of Respondents

Dean Witter Reynolds, Inc.,
Mike Torrence, Jeffrey Shumaker,
Rick Cisar, Chris Hasney and
Bert Simmon

REPRESENTATION

Claimant was represented by Shaun T. Gloude, Esq. and William Wedum, Esq. of Littleton, Colorado.

Respondents were represented by Joseph E. Mais, Esq. and Victoria S. Lewis, Esq. of Brown & Bain, P.A., Phoenix, Arizona.

CASE INFORMATION

The Statement of Claim was filed with the National Association of Securities Dealers, Inc. ("NASD") on June 15, 1992.

Respondents filed a Joint Statement of Answer and Respondent Dean Witter Reynolds Inc. ("Dean Witter") filed a Counterclaim with the NASD on September 1, 1992. Claimant filed a Reply to Dean Witter's Counterclaim on October 15, 1992.

Claimant filed an Amended Statement of Claim on May 4, 1993. Respondents filed an Answer to the Amended Statement of Claim on May 21, 1993.

The Respondents filed a Motion for Summary Judgment on all claims made by Claimant with the NASD on October 26, 1993. Claimant filed a Response to the Motion for Summary Judgment with the NASD on November 23, 1993. Respondents filed a Reply to the Response with the NASD on November 19, 1993 and filed a Second Reply on December 3, 1993.

HEARING INFORMATION

Pre-hearing conferences were held on September 23, 1993 for one (1) hearing session and November 29, 1993 for one (1) hearing session.

The hearing took place on December 13, 1993 for two (2) hearing sessions.

The hearing location was Scottsdale, Arizona.

CASE SUMMARY

In his Amended Statement of Claim, Claimant La Vern Dale Dixon ("Dixon") alleges a first claim of relief for defamation, a second claim for relief for tortious interference with prospective business advantage, a third claim for relief for negligent misrepresentations, a fourth claim for relief for negligence, a fifth claim for relief for civil conspiracy, and a sixth claim for relief for punitive damages. These claims are alleged against all Respondents.

Respondent, Dean Witter Reynolds, Inc. ("Dean Witter") alleged a Counterclaim against Dixon for damages caused by Dixon's alleged misconduct.

The operative facts of this dispute concern the circumstances under which Dixon was no longer engaged as a registered representative of Respondent, Dean Witter and subsequent events that occurred. Respondents claimed that Dixon was terminated for cause. Dixon claimed that he resigned his position with Respondent Dean Witter. Dixon alleged that after he left the employment of Respondent Dean Witter that Respondents defamed, libeled and slandered Dixon through filings of allegedly false Form U-5's with the National Association of Securities Dealers, Inc. Respondents contended that as a consequence of Dixon's actions while he was a registered representative of Respondent Dean Witter that Respondents were injured in their business relationships with clients and had to repay clients the approximate sum of \$250,000.

RELIEF REQUESTED

Dixon sought an unspecified amount of actual and punitive damages for his claims against Respondents. Dixon also sought removal from the N.A.S.D.'s record various allegedly false Form U-5's filed with the NASD by Respondent Dean Witter. Finally, Dixon requested an award of costs, attorney's fees and interest.

Respondents generally requested the dismissal of Claimant's claims and that they be awarded costs and attorneys' fees. Respondent Dean Witter Reynolds, Inc. also sought in its Counterclaim, damages of not less than \$500,000 together with interest, attorneys' fees and costs.

PRE-HEARING MATTERS

At the first telephonic pre-hearing conference held on September 23, 1993 the Panel heard oral argument on a variety of discovery disputes. Many of the disputes were resolved in the course of the pre-hearing conference. As a result of the pre-hearing conference, the Panel issued a pre-hearing order setting a schedule for discovery and the filing and procedure for hearing pre-hearing motions.

A second pre-hearing conference was held on November 29, 1993 at which time Claimant's counsel requested a continuance of the hearing scheduled to commence on December 13, 1993. The Panel heard oral argument on this motion, reviewed and considered briefs and oral argument and unanimously denied Claimant's motion for continuance.

RESPONDENTS' MOTION FOR SUMMARY JUDGMENT

Respondents argued in a motion for summary judgment that all of Claimant's claims for relief should be dismissed. Respondents argued five alternative bases for the summary judgment they sought. They argued that there is either an absolute or a qualified privilege from liability for the matters contained in the Form U-5 filings. Respondents also argued that Claimant had released Respondents from liability in his Form U-4. Finally, Respondents argued that Claimant's claims were either barred by applicable statutes of limitations or that liability cannot be imposed because the legal elements for the claims were not satisfied. Claimant argued that there were issues of material fact which could only be resolved by an arbitration on the merits.

In the course of argument on the motion for summary judgment at the first hearing session on December 13, 1993, Claimant's counsel advised the Panel and Respondents' counsel that Claimant had filed for protection under the U.S. Bankruptcy laws. Claimant's counsel represented to the Panel that Claimant's Bankruptcy was filed on Thursday, December 9, 1993 and may be identified as Case No. 93-3517/TUC LO. Accordingly, the Panel determined that Dean Witter's Counterclaim was barred by the automatic stay imposed under the Federal Bankruptcy Code.

AWARD

After hearing oral argument from both Claimant's and Respondents' counsel, after reviewing the entire record in this matter including the briefs filed in support of and in opposition to Respondents' Motion for Summary Judgment and after giving due consideration and deliberation, the Panel finds as follows:

1. Respondents' Motion for Summary Judgment is granted. In making this determination the panel made the following findings:

- a). Arizona law is the substantive law controlling the claims at issue in this case;
 - b). The standard for summary judgment in Arizona is that summary judgment is required unless evidence presented in opposition to the motion is sufficient to lead a reasonable person to find in favor of the non-moving party. The Panel affirmatively finds that the "slightest doubt" standard urged by Claimant is not the law in Arizona;
 - c). Respondents do not have an absolute privilege for filings they make with the National Association of Securities Dealers, Inc.;
 - d). Respondents do have a qualified privilege for filings they make with the National Association of Securities Dealers, Inc. This privilege may be overcome with evidence of malice in fact. The Panel finds that the permission of a public customer is not necessary for a securities brokerage firm to file a Form U-5 referencing such customer. Claimant was unable to articulate any facts or evidence that a reasonable person could find that Respondents acted with malice in fact;
 - e). The Panel also finds that there is a substantial public interest and public policy favoring full and candid disclosure by securities brokerage firms with regulatory authorities. Absent a prima facie showing that Respondents acted with malice in fact toward Claimant, this Panel will not chill a firm's exercise of its responsibility to the public;
 - f). The Panel further invites Claimant to continue to seek relief in correcting allegedly inaccurate Form U-5's with the District Business Conduct Committee and to take whatever steps considered appropriate to correct Claimant's file with the National Association of Securities Dealers, Inc.; and,
2. Other than the Forum Fees which are addressed below, the parties are each to bear their respective costs, expenses and attorneys' fees.

FORUM FEES

Pursuant to Section 44c of the NASD Code of Arbitration Procedure, the following Forum Fees are assessed. The NASD shall retain the non-refundable claim filing fee in the amount of \$500.00 and shall retain the hearing session deposit in the amount of \$1500.00 previously paid to the NASD by the Claimant. The NASD shall also retain the \$500.00 non-refundable counterclaim filing fee and the \$750.00 counterclaim hearing session deposit previously paid to the NASD by Respondent, Dean Witter Reynolds, Inc. Respondent, Dean Witter Reynolds, Inc. is assessed additional Forum Fees in the amount of \$3750.00.

Forum Fees were assessed on the basis \$1500.00 per hearing session for four (4) hearing sessions which includes the two single session pre-hearing conferences before the entire panel and the two hearing sessions held on December 13, 1993.

The NASD will also retain the \$1000.00 postponement fee paid to the NASD by Respondents to obtain a postponement of a previously scheduled hearing date. Additional Forum Fees assessed by the Panel are payable to the National Association of Securities Dealers, Inc.

Signatures of Concurring Arbitrators

December 31, 1993

Dated

/S/ Jon A. Titus

Jon A. Titus, Esq.
Presiding Chair
Industry Arbitrator

January 3, 1994

Dated

/S/ C. Dee Simpson

C. Dee Simpson
Panelist
Industry Arbitrator

January 3, 1994

Dated

/S/ Bruce Lindvig

Bruce Lindvig
Panelist
Securities Arbitrator

Date Award Served on the Parties: January 10, 1994